

1 Frank Scherkenbach (CA SBN 142549)  
scherkenbach@fr.com

2 FISH & RICHARDSON P.C.  
One Marina Park Drive  
3 Boston, MA 02210-1878  
Telephone: (617) 542-5070  
4 Facsimile: (617) 542-8906

5 Jonathan J. Lamberson (CA SBN 239107)  
lamberson@fr.com

6 FISH & RICHARDSON P.C.  
500 Arguello Street, Suite 500  
7 Redwood City, CA 94063  
Telephone: (650) 839-5070  
8 Facsimile: (650) 839-5071

9 John W. Thornburgh (CA SBN 154627)  
thornburgh@fr.com

10 Olga I. May (CA SBN 232012)  
omay@fr.com

11 FISH & RICHARDSON P.C.  
12390 El Camino Real  
12 San Diego, CA 92130  
Telephone: (858) 678-5070  
13 Facsimile: (858) 678-5099

14 Attorneys for Plaintiff  
MICROSOFT CORPORATION

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

18 MICROSOFT CORPORATION,

19 Plaintiff,

20 v.

21 COREL CORPORATION AND COREL INC.,

22 Defendants.

Case No. 5:15-cv-05836-EJD

**PLAINTIFF MICROSOFT  
CORPORATION'S PARTIALLY  
UNOPPOSED ADMINISTRATIVE  
MOTION FOR 60-DAY EXTENSION OF  
TIME FOR ITS OPPOSITION TO COREL  
CORPORATION AND COREL INC.'S  
MOTION FOR SUMMARY JUDGMENT  
UNDER RULE 56(D)**

**REDACTED**

Judge: Hon. Edward J. Davila  
Crtm.: 4, 5<sup>th</sup> Floor

26 AND RELATED COUNTERCLAIMS.

**I. INTRODUCTION**

Plaintiff Microsoft Corporation requests a 60-day extension of time to file its opposition to Corel's Motion for Partial Summary Judgment on Defense of Express License, currently due on June 6. This case is still in early stages. Corel moved for summary judgment without ever producing any discovery except for the unrelated mandatory Patent L.R. 3-4 production for its invalidity contentions. Given the potentially claim-dispositive nature of Corel's motion, this extension is necessary for Microsoft to obtain facts essential to its opposition and to present the Court with a complete record for a well-informed decision.

Corel does not oppose the 60-day extension but wants to limit Microsoft's discovery to only one issue. [May Decl., Ex. A, B.] Microsoft should be allowed to conduct any discovery relevant to its opposition to Corel's potentially claim-dispositive motion, on any issue that may raise a genuine issue of material fact. Denial of this discovery would severely prejudice Microsoft. In contrast, the extension would not prejudice Corel, given Corel's consent to the extension, the October 6 hearing date, and early stages of the case.

**II. BACKGROUND**

Microsoft filed this case for infringement of its nine patents on December 18, 2015. [D.I. 1.] Defendants Corel Corporation and Corel, Inc. (collectively "Corel") filed their Answer on February 17, 2016. [D.I. 28.] Three months later, on May 19, 2016, Corel for the first time notified Microsoft that Corel intends to move to amend its Answer to add a defense based on the agreement the parties executed in 2000.<sup>1</sup> [May Decl. ¶ 1.] On May 20, Corel moved to amend its Answer, including to add a defense of an express license for U.S. Patent No. 5,510,980 ("the '980 patent"). [D.I. 47.] On May 23, Corel for the first time informed Microsoft that Corel also intends to move for summary judgment on this defense. [May Decl. ¶ 2.] Corel filed the motion the same

---

<sup>1</sup> Corel's assertion in its motion to amend claims that Microsoft "did not disclose" this agreement is wrong. [D.I. 47, Mot. at ¶ 4.] Microsoft referenced this agreement in its Complaint. [D.I. 1, Compl. ¶ 48 ("Corel has had knowledge of Microsoft's rights in the '980 patent since at least the date of its issuance on April 23, 1996, and no later than 2000, when the parties had confidential interactions that cannot be detailed in this public filing. As a result of these interactions, in 2000, Corel was aware that it needed a license to the '980 patent for Corel's products.")] Further, Corel is a party to this agreement, executed in 2000, and has been well aware of its existence.

1 day, May 23. [D.I. 48.]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [D.I. 49-3, Ex. A to Hall Decl. at p. 7.]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED] [May Decl. ¶¶ 4-7.]

26 Discovery in this case is in early stages. Microsoft served its first sets of Requests for

27

28 <sup>2</sup> Microsoft identified these grounds based on its present investigation. Microsoft does not waive its right to raise other issues or grounds in its opposition.

1 Production and Interrogatories on February 26, 2016. To date, Corel has not produced any  
2 documents beyond those required with its invalidity contentions under Patent L.R. 3-4. [May  
3 Decl. ¶ 3.] The parties have not taken a single deposition. *Id.*

4 The fact discovery cut-off is February 17, 2017, expert discovery cut-off is May 12, 2017,  
5 deadline for filing dispositive motions is May 30, 2017, and no trial date has been set. [D.I. 38.]

### 6 **III. LEGAL STANDARD**

7 Rule 56(d) provides:

8 When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or  
9 declaration that, for specified reasons, it cannot present facts essential to justify its  
10 opposition, the court may:

- 11 (1) defer considering the motion or deny it;  
(2) allow time to obtain affidavits or declarations or to take discovery; or  
(3) issue any other appropriate order.

12 “Where a summary judgment motion is filed before a party has an opportunity to pursue  
13 discovery relating to its theory of the case, district courts should grant any Rule 56(d) motion  
14 *fairly freely*. The rule requires discovery where the non-moving party has not had the opportunity  
15 to discover information that is essential to its opposition. *Tessenderlo Kerley, Inc. v. Or-Cal, Inc.*,  
16 2012 WL 2054994, at \*2 (N.D. Cal. June 5, 2012) (citing *Burlington Northern Santa Fe v.*  
17 *Assiniboine & Sioux Tribes*, 323 F.3d 767, 773 (9th Cir. 2003)) (emphasis added).

### 18 **IV. ARGUMENT**

19 The extension is necessary to allow Microsoft adequate opportunity to prepare an  
20 opposition to Corel’s potentially claim-dispositive motion. Corel’s motion for partial summary  
21 judgment is based on the [REDACTED] Microsoft needs to conduct discovery, including  
22 into evidence that [REDACTED]

23 [REDACTED], Corel’s motion should be denied.

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. [May Decl. ¶ 5.]

[REDACTED]

[REDACTED]  
[REDACTED]  
2:15-cv-00528-EJF [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED] Corel Software LLC brought the  
Utah suit asserting those patents against Microsoft. With its motion for partial summary  
judgment, Corel submitted a declaration of Patrick Nichols with the unsupported conclusory  
statement that [REDACTED]

---

<sup>3</sup> See <http://www.vectorcapital.com/investments/case-study/corel>;  
<https://en.wikipedia.org/wiki/Corel>

1 [REDACTED] Microsoft needs to  
2 conduct discovery into whether [REDACTED]  
3 [REDACTED]  
4 [REDACTED] and any support for Mr. Nichols' statements. [May Decl. ¶ 6.] Finally,  
5 Microsoft needs to conduct discovery into whether Corel [REDACTED]  
6 [REDACTED] [May Decl. ¶ 7.]

7 To the best of Microsoft's knowledge, the information described above is likely to exist, is  
8 Corel's internal information, and is in possession of Corel. Microsoft anticipates to obtain this  
9 information through depositions and written discovery. [May Decl. ¶¶ 8-9.]

10 The relief Microsoft seeks will resolve the issues efficiently and without prejudice to  
11 Corel. Corel has already acknowledged that it will not be prejudiced by a 60-day extension  
12 because Corel agreed to the extension of time. [May Decl., Ex. A.] This extension will not affect  
13 the hearing on the motion, currently set for October 6, 2016.<sup>4</sup> Barring any discovery disputes, the  
14 motion will be fully briefed well before October 6.

15 Corel should not be allowed to put any limitations on any relevant discovery by Microsoft  
16 during that time. "Parties may obtain discovery regarding any nonprivileged matter that is  
17 relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Nor can Corel dictate  
18 Microsoft's position and limit the issues Microsoft can raise in its opposition.

19 In contrast, denial of this extension would severely prejudice Microsoft. Corel filed this  
20 motion for summary judgment before giving Microsoft any chance to conduct discovery on the  
21 issues. Corel should not be allowed to seek a potentially claim-dispositive ruling without  
22 providing Microsoft an opportunity to investigate and prepare a thorough response.

## 23 **V. CONCLUSION**

24 Based on the above, Microsoft should be granted a 60-day extension to prepare its  
25 opposition without any limitations on discovery beyond those under applicable law.

26 \_\_\_\_\_  
27 <sup>4</sup> When Corel contacted Microsoft regarding the hearing on its motion for summary judgment,  
28 Microsoft informed Corel that October 6 is not a convenient date. Microsoft is available on  
October 20, 27, and November 17. Corel advised Microsoft that it contacted the Court regarding  
rescheduling the hearing.

1 Dated: May 31, 2016

FISH & RICHARDSON P.C.

2 By: /s/ Olga I. May  
3 Olga I. May

4 Frank Scherkenbach (CA SBN 142549)  
5 scherkenbach@fr.com  
6 FISH & RICHARDSON P.C.  
7 One Marina Park Drive  
8 Boston, MA 02210-1878  
9 Telephone: (617) 542-5070  
10 Facsimile: (617) 542-8906

11 Jonathan J. Lamberson (CA SBN 239107)  
12 lamberson@fr.com  
13 FISH & RICHARDSON P.C.  
14 500 Arguello Street, Suite 500  
15 Redwood City, CA 94063  
16 Telephone: (650) 839-5070  
17 Facsimile: (650) 839-5071

18 John W. Thornburgh (CA SBN 154627)  
19 thornburgh@fr.com  
20 Olga I. May (CA SBN 232012)  
21 omay@fr.com  
22 FISH & RICHARDSON P.C.  
23 12390 El Camino Real  
24 San Diego, CA 92130  
25 Telephone: (858) 678-5070  
26 Facsimile: (858) 678-5099

27 Attorneys for Plaintiff  
28 MICROSOFT CORPORATION